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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____, 1975 Term

75-5281

RONNIE YOUNG,

PETITIONER

v.

STATE OF
NORTH CAROLINA,

RESPONDENT

****

On Writ of Certiorari

To the Supreme Court of North Carolina

****

PETITION FOR WRIT OF CERTIORARI

****

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Petitioner

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Ronnie Young,

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH CAROLINA

****

The Petitioner, Ronnie Young, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of North Carolina, entered in this cause on June 6th, 1975.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____ N.C. _____, _____ S.E.2d _____ (1975). A copy of this opinion is appended to this petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was made and entered on June 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C.A., §1257(3).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

Constitution of the United States.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statute 14-17, Vol 1B, Page 316.

Murder in the first and second degree defined; punishment. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed

to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury.

QUESTION PRESENTED

1. Was death sentence unconstitutional in North Carolina on August 18, 1973?

STATEMENT OF THE CASE

This procedure arises in the Supreme Court of North Carolina.

Petitioner was arrested on August 21, 1973 without a warrant for the first degree murders of Steve Helton and Sharon Williams on August 18th, 1973. The defendant, prior to pleading to the bills of indictment, and in apt time, filed a Motion to Quash the Bills of Indictment upon the grounds that the death penalty as applied in this State violates the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. Additionally, upon the coming in of the verdicts in each case and upon the pronouncement of a judgment of death in each case, the defendant, in apt time, moved the trial court to arrest judgment in each case upon the same grounds as those cited in the Motion to Quash. Both motions were overruled and denied and such rulings are herewith assigned as error.

ARGUMENT

I. DUE PROCESS WAS DENIED IN THAT THE MANNER IN WHICH THE DEATH PENALTY WAS DERIVED WAS ARBITRARY, CAPRICIOUS, SUBJECTIVE AND SELECTIVE.

In FURMAN v GEORGIA, 408 US 238 (1972), and its companion cases, the Supreme Court of the United States ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments" id at 239-240. The Court accordingly entered orders vacating the death sentences of 125 condemned men in twenty-six states. See STEWART v. MASSACHUSETTS, 408 US 845 (1972) and companion cases 408 US 932-941 (1972); MOORE v ILLINOIS, 408 US 786 (1972).

On remand, these orders were effectuated and state courts also granted sentencing relief to other men condemned to die before FURMAN under statutes which provided for the discretionary imposition of the death penalty by juries or trial judges. The result of these decisions was almost universally to forbid the infliction of capital punishment in the absence of new legislation. Thirty States subsequently enacted some form of death penalty legislation, commonly providing for a narrower range of capital offenses than those states maintained before FURMAN.

North Carolina, however, through four of this Court's distinguished seven, took a very different course. Although this Court had previously vacated several death sentences on FURMAN grounds, e.g., STATE v. BLACKMON, 284 NC 1, 199 SE 2d 431 (1973); STATE v. WATKINS, 283 NC 504, 196 SE 2d 750 (1973); STATE v. WESTBROOK, 281 NC 748, 191 SE 2d 68 (1972); STATE v. DOSS, 281 NC 751, 191 SE 2d 70 (1972); STATE v. CHANCE, 281 NC 746, 191 SE 2d 65 (1972); STATE v. HAMBY, 281 NC 743, 191 SE 2d 66 (1972); STATE v. MILLER, 281 NC 740, 190 SE 2d 841 (1972), it ruled prospectively in STATE v. WADDELL, 282 NC 431, 194 SE 2d 19 (January 18, 1973), that the death penalty could continue to be imposed for North Carolina's four pre-FURMAN capital crimes without the enactment of new legislation. In WADDELL, the appellant had been condemned to die for rape under North Carolina General Statutes §14-21. This Court, after analyzing the opinion of the concurring justices in FURMAN, concluded that Capital punishment has not been declared unconstitutional per se", 194 SE 2d 25, and that "it is the proviso (authorizing the jury to recommend mercy in a capital case) and the proviso alone - which creates the discretionary difficulty condemned by the FURMAN decision." 94 SE 2d at 26-27. Thus, the majority held that FURMAN invalidated only the proviso,

and that the remainder of North Carolina General Statutes §14-21 providing a mandatory death penalty for rape, was fully operative. Under the procedure thus established, at least sixty-five defendants have been sentenced to die in North Carolina for offenses committed between January 18, 1973, (the decision date of WADDELL) and April 8, 1974, (the date when a new North Carolina capital punishment went into effect.)

What WADDELL has done in fact is to change the rules, but not the nature of the result. During the quarter of a century between the enactments of the recommendation of mercy provisos by the North Carolina legislature and the date of WADDELL, countless men died and others guilty of identical crimes were spared from death pursuant to one form of arbitrary selective procedure which - as this Court itself concludes - fell unmistakably under FURMAN's prohibition. The response of four justices of this Court was to say essentially that, because the persons spared should not have been spared (under an appropriate elaboration of state's severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-FURMAN statute authorizing capital punishment would be arbitrary and selective, and hence a cruel and unusual punishment, in the wake of FURMAN. Henceforth, different arbitrary and selective procedures are to be used to decide whether particular defendants are or are not fit to live; that intractable judgment is to be made in numerous covert ways which conceal while increasing the irregularity, irrationality, and irresponsibility of the life or death decisions. Moreover, the historical lesson learned through decades of overtly discretionary capital sentencing - that the death penalty is no longer widely accepted, but is instead resoundingly repudiated by the institutions of criminal justice that have actually borne the terrible responsibility for choosing

between life and death as the disposition for even the most heinous of offenders - is to be ignored, as though it never happened. With all respect, this result is heedless of FURMAN, heedless of history and forbidden by the Eighth and Fourteenth Amendments.

Although the prevailing FURMAN opinions differ somewhat in regard to the questions left unanswered by the square holding of that case, each opinion condemns at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by an irregular and erratic selective process. FURMAN thus accords contemporary recognition to a central historic concern of the Eighth Amendment: "That government by the people, instituted by the Constitution, ...not imitate the conduct of arbitrary monarchs." WEEMS v. UNITED STATES, 217 US 349, 376 (1910). As the U. S. Supreme Court recognized, the cruel and unusual punishment clause of the Eighth Amendment is derived from the almost identical worded tenth clause of the English Bill of Rights of 1689. The preamble to the Bill of Rights declare that James II had endeavored to "subvert" the "laws and liberties of this Kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of Parliament." The first two clauses accordingly declare that such conduct on the part of the King and the Royal Judges illegal, and clause 10 prohibited the infliction of cruel and unusual punishments." The legislative history of this provision makes clear that it was intended to prohibit the inflicting of harsh punishments that were arbitrarily imposed. While the Bill of Rights was pending in Parliament, and Anglican clergyman Titus Oates appealed his 1685 perjury conviction to the House of Lords. Oates had been convicted in the King's bench of giving false testimony during the "Popish Plot" trials of

1678-1679, and had been sentenced to be defrocked, to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to be pilloried four times a year. That punishment was harsh, discriminatory and arbitrary in the extreme - a manifest attempt to avenge Oates' anti-Catholic intrigues against James II (who had then been Duke of York) by the imposition of punishments that were both unauthorized by statute and outside the jurisdiction of the sentencing court. Oates' conviction and sentence were affirmed in the House of Lords, with thirteen of the members dissenting strongly on the grounds that these punishments were "cruel, barbarous, and illegal" and "contrary to the Declaration of Rights of the 12th of February, 1684.

Oates then sought relief in the House of Commons, where his case was strongly taken up by militant Protestants, who secured passage of a resolution "That Bills be brought in to reverse the Judgments against Mr. Oates ...as cruel and illegal." Sir William Williams declared during the debate on this bill: "Let any man give us a precedent to square with that Judgment. It makes the Judges arbitrary and hereafter the Judges may be most injurious in punishing." When a deadlock occurred with the House of Lords over a collateral matter, one of the floor managers from the Lords (whose bill gave Oates more limited relief than the Commons bill) admitted that the Oates judgment was illegal but declared that Oates deserved punishment for his libels. A member of Commons responded: "Be it so. This bill gives him no indemnity. We are quite willing that, if he is guilty, he shall be punished. But for him, and for all Englishmen, we demand that punishments shall be regulated by law, and not by the arbitrary discretion of any tribunal." See III MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II, Page 310 (1850)

By the time of the framing of the American Bill of Rights, eight states had adopted prohibition of "cruel and unusual punishments" that were modeled upon Clause 10 of the English Bill of Rights and the federal government had inserted a similar provision into the Northwest Ordinance of 1787. Because early American legal history is so obscure, it is not possible to know exactly what the draftsmen of these provisions intended. However, whatever else such clauses were intended to prohibit, it is unlikely that they were not intended to guard against the arbitrary infliction of harsh punishments. For there is evidence that the colonists were concerned with this issue. In 1635, the Governor John Winthrop described the attempts of the Massachusetts Bay Colonists to draft a comprehensive criminal code in order to limit the discretion of the magistrates: "The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions; it is agreed that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court should be received for fundamental laws." See WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686 (Page 5) (1889). The writings of Blackstone, whose influence on the development of colonial American law was enormous, had echoed the 1689 Parliamentary debates concerning the Oates case by stressing the fact that English law did not allow the arbitrary infliction of punishment.

Finally, the American statesmen who framed the state and federal prohibitions on cruel and unusual punishments in the late Eighteenth Century typically believed that their rebellion against Britain had been justified in order to preserve their inherited

English civil rights and political freedoms. It therefore seems unlikely that they would consciously have rejected or limited any of their traditional liberties, including the right to be safe from the arbitrary infliction of harsh punishments.

The arbitrary infliction of death which the U. S. Supreme Court condemned in FURMAN and companion cases arose, of course, from various procedures whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death. See, for a description of these variations, STATE v. RHODES, ____ Mont. ____, 524 P 2d 1095 at 1099 (1974) and McGAUTHA v. CALIFORNIA, 402 US 183, 197 203 (1971). But - particularly in light of McGAUTHA v. CALIFORNIA, supra, - it is impossible to read FURMAN as prohibiting only the explicit statutory enunciation of jury discretion to impose alternative sentences of imprisonment or capital punishment. Surely FURMAN and the Eighth Amendment forbii any arbitrarily selective imposition or the "unique penalty" of death, whatever the source of mechanism of the arbitrariness. See FURMAN, supra, 408 US at 310 (concurring opinion of Mr. Justice Stewart). The particular method of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure but with their result. See FURMAN v. GEORGIA, supra, 408 US at 313 (concurring opinion of Mr. Justice White). See also CHAMBERS v. MISSISSIPPI, 410 US 284, 302-303 (1973); MEMPA v. RHAY, 389 US 128, 135-137 (1967); JACKSON v. DENNO, 378 US 368, 391 Note 19 (1964). It "nullifies sophisticated and well as simple minded modes" of producing unconstitutional consequences. LANE v. WILSON, 307 US 268, 275 (1939). Federal constitutional guarantees cannot

as Justice Holmes wrote in another context - "Be evaded by attempting a distinction" of form without a difference in substance. DAVIS v. WECHSLER, 263 US 22, 24 (1923).

To be sure, WADDELL'S annulment of the North Carolina "recommendation" statute ostensibly made death the exclusive punishment for first degree murder, rape, first degree burglary and arson. But the implementation of the death sentence for this broad range of offenses inevitably required the exercise of vast and uncontrolled selective discretion by district attorneys, in choosing which defendants would live and which would die in cases where the death penalty was potentially applicable after WADDELL. Language requires that the several practices through which the unrestrained and arbitrary discretion infects the administration of the death penalty under WADDELL be described separately, and we shall do so in the following subsections of this brief.

As demonstrated by Professor Charles Black in his recent trenchant analysis, the result of numerous interrelated arbitrary processes in the administration of the death penalty in North Carolina is exactly the result condemned by FURMAN. Death sentences which are "wantonly...and freakishly imposed." FURMAN v. GEORGIA, supra, 408 US at 310 (concurring opinion of Mr. Justice Stewart).

And this means not merely that a few men die for crimes no more atrocious than the crimes of many who are spared. It means also that society's most extreme and irremediable punishment is likely to be practiced principally upon the outcast of society. Discrimination is inseparable from arbitrariness wherever social attitudes make men or groups unequal or unpopular. That had not ceased to be the case in England three centuries after Titus Oates, and it assuredly has not ceased in this country where "throughout our history differences in race have defined easily identifiable groups which at times required the aid of the courts in securing

equal treatment under the laws."

As long ago as 1931, the Wickersham Commission reported that the prosecutor (is) the real arbiter of what laws are enforced and against whom...." See COMMISSION ON LAW OBSERVANCE, ENFORCEMENT AND PROSECUTION 19 (1931). See also DAVIS, DISCRETIONARY PRELIMINARY INQUIRY 188-214 (1971).

In North Carolina, the prosecuting attorney (once called the Solicitor) now called the District Attorney, is charged with the duty to "prepare the trial dockets, (and) prosecute on behalf of the State ALL CRIMINAL ACTIONS REQUIRING DISPOSITION in the superior and district courts of his district. North Carolina General Statutes §7A-61 (1973 Cum.Supp.) (Emphasis added). A district attorney is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions, STATE v. LOESCH, 273 NC 611, 75 SE 2d 654, 565 (1953), including not only absolute discretion whether and what to charge, but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment event if the evidence shows that a greater crime has been committed. STATE v. ALLEN, 279 NC 115, 181 SE 2d 453, 455 (1971); see also STATE v ROY, 233 NC 558, 64 SE 2d 840, 841 (1951).

Thus far, this Court has steadfastly refused to review prosecutorial decisions. The leading case is STATE v. CASEY, 159 NC 472, 74 SE 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. This court rejected this contention, commenting that the appellant had no "privilege to be tried for the capital felony" and concluding that "if the Solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 SE at 625.

The consequence of this unfettered prosecutorial discretion is, of course, that different district attorneys utilize DIFFERENT standards, or NO STANDARDS AT ALL, in deciding whether to initiate capital or non-capital prosecutions. Without any guidance whatsoever, a district attorney is free to make the decision whether an indictment will be sought for first or second degree murder or manslaughter, for rape or assault with intent to rape, or for first or second degree burglary, or, as the record in this case clearly establishes, to utilize, for his own staff's convenience, forms as may be prepared and shipped to him by some other agency of the government. Accordingly it is seen that the district attorney may, without violating his trust or any statutory policy, refuse to seek the death penalty, no matter what the consequences of the crime. This unconstrained discretion doubtless accounts in considerable part for the striking fact that there have been only three convictions for first degree burglary during a full year of WADDELL'S implementation in a state where there were about forty convictions annually for this crime in the recent past, and where 39,210 burglaries and housebreakings were reported in 1972. The conclusion is inescapable that solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary prosecutions in cases where they might have obtained convictions for this crime.

The inconsequential number of first degree burglary convictions under the WADDELL decision is hardly surprising, since the exercise of prosecutorial discretion to blunt the impact of "mandatory" penalties in sympathetic cases has been one of the most significant phenomena observed in the enforcement of such statutes: Usually, a less serious offense is charged because

conviction of the maximum offense carries a statutory mandatory minimum sentence.

As with the death penalty statutes struck down in FURMAN, it is not necessary to conclude that North Carolina's capital laws are being intentionally administered "with an evil eye and an unequal hand," YICK WO v. HOPKINS, 118 US 356, 373-374 (1886). The point rather is that their implementation is necessarily and unavoidably arbitrary, selective and subjective. Since no standards exist to regularize the exercise of prosecutorial discretion, there is nothing to guarantee that some defendants, like the appellant herein, will not be capitally charged and tried while other defendants, probably guilty of similar conduct, are prosecuted for second degree murder or manslaughter. Although the choice of charge or trial is quite literally the difference between life and death, discretionary decision of the district attorney.

We know from the record in the instant case that at least forty individuals were indicted for capital offenses in the Twenty-Sixth Judicial District of this State, (Mecklenburg County) after the decision date in WADDELL (January 17, 1973) and the 29th day of July, 1974. Actually, there were additional capital indictments returned as true bills by the Grand Jury of Mecklenburg County between those dates, but since no final disposition had been made, those additional indictments were not included in the record.

Of the forty individuals indicted for capital offenses of which disposition had occured, eleven were white and twenty-nine black. Six of the forty indictments were nol prossed, twenty-seven were arraigned and tried upon the original indictment. Thus, the solicitorial discretion in this district would indicate that

only approximately seventeen and one-half percent (17½%) (seven out of forty) were arraigned and tried by the solicitor as indicated.

Assuming, arguendo, that the authority of absolute discretion given to the various prosecutors in this State be constitutionally permissible, the appellant in the instant case argues that the inquiry must go one step beyond, to the determination of whether or not such discretion is applied in a constitutionally sound manner so that each member of the class of persons indicted for capital offenses shall have the benefit of equal protection of the laws and due process of law. It is assumed for purposes of this inquiry that no doubt remains that the Constitution requires equal application of all law to all people and further that while any statute may be constitutionally permissible as written it may be void because of its application in a manner which denies fundamental evenness and uniform application.

Hence, our inquiry is directed toward the "mechanics" of application, operation, and exercise of discretion by which the district attorney of this district conducts his office. From the record in this case, we find the following:

1. That it is a policy that police officers of the district are required to come to the district attorney's office in all felonies and specifically all homicides to go over with the district attorney the facts and background in each particular case.

2. That this procedure is rarely followed and that in a majority of situations the police have already entered a charge of murder in the first degree prior to the reporting process.

3. That after this conference is held, a recommendation by the solicitor's office is made on some internal screening forms

for the assistant district attorney in the preliminary hearing; that at the time of the hearing in the particular case, a lesser charge, second degree, manslaughter, or what-have-you, or a waiver of preliminary hearing may be waived; that thereafter the preliminary hearing of the case comes to the district attorney's office for the drawing of the bill of indictment.

4. That the procedure is that the bill is drawn showing first degree, mainly for the convenience of the secretaries in a solicitor's office since they have forms provided for that charge.

5. That notwithstanding that fact, the initial disposition recommendation, second degree, manslaughter, or what-have-you, that is attached in the district court will normally be utilized in the superior court disposition; that prior to arraignment of the individual so indicted a discussion is held with the assistant district attorney who presided over the preliminary hearing in the district court and that in consultation with him, a decision is made as to what degree of murder the person is to be arraigned upon.

6. In the case of STATE v. RONNIE DUNN, a rape charge was nol prossed because the prosecuting witness was placed on polygraph and showed deception as to the facts and circumstances surrounding the alleged crime and that the defendant was placed on polygraph and showed no deception.

7. In the case of NORTH CAROLINA v. L. D. WALKER, it was discovered that Mr. Walker was a member of the Charlotte Police Department and that the district attorney was surprised, as well as the community as a whole, that a true bill of indictment was returned against him, and that accordingly a personal intensive investigation of that case was performed and it was the district attorney's opinion that the case should be nol prossed, which was done.

8. That in the case of NORTH CAROLINA v. ANN MONTEITH JORDON, the defendant was allowed to plead second degree murder because she was a white female who shot her paramour, a white male, and upon the further basis that the decedent had on several occasions and on the date of the homocide abused her verbally and physically, and that both the defendant the decedent were intoxicated at the time of the decedent's death.

9. That in the case of NORTH CAROLINA v. AARON RANDOLPH BONE, the defendant was indicted for the capital offense of rape and that a plea bargain was worked out to the satisfaction of a private prosecutor presumably because the prosecuting witness enticed the defendant and that the defendant was an alcoholic with some mental problem, and was rooming with the prosecuting witness at the time of the alleged offense.

10. That in the case of NORTH CAROLINA v. JAMES THOMPSON who was charged with rape, that the defendant was a white male, age twenty-six; that he had a low IQ of 30-40, and that the alleged rape victim was a white female 12, 13, or 14 years old for whom he was babysitting at the time.

11. That in the case of NORTH CAROLINA v. BRUCE DUNAWAY, Mr. Dunaway was involved in a shoot-out at a drugstore where a druggist was killed; that the evidence showed that the defendant fired a fatal shot at the victim and that the victim got a shot at him which struck him in the spine; that he was a paraplegic with loss of one arm and that he was allowed to plead guilty and sent to prison for that reason.

12. That in the case of NORTH CAROLINA v. CALVIN "PEANUT" MITCHELL, there was some plea bargaining and that the defendant, who was charged with first degree murder, was allowed to plead guilty to second degree murder.

13. That in the case of STATE v. ROBERT LEE PRINCE, the defendant was charged with murder in the first degree, was placed on trial for his life and was later allowed to plead guilty to manslaughter.

14. That in the case of NORTH CAROLINA v. JEANETTE McFADDEN, the defendant, who was charged with first degree murder, was trying to shoot one individual and due to poor aim, missed and killed another individual and that because of this and for the further reason that there was some drinking involved and some arguing about cars, the defendant was allowed to plead guilty to voluntary manslaughter.

15. That Mr. Moore, as District Attorney of the Twenty-Sixth Judicial District, did not have specific knowledge or information relative to the remaining cases of the nature and type included in this record.

16. That it is not a standard and uniform policy of the district attorney's office to request defendants to take polygraph tests or to request defendant's attorneys to in turn ask their clients to take polygraph tests in capital cases.

17. That it is not a standard part of the screening apparatus to request defendants to take polygraph tests.

18. It is not a standardized part of the district attorney's screening process to give polygraph tests to state's witnesses in cases where the state has brought indictments in capital cases, that it is not a policy of the district attorney's office to give polygraph tests if an attorney for a defendant or the defendant himself requests that his accuser be given such a test.

19. That it is not a standard and uniform policy of the solicitor's office in screening capital cases to give the defendant intelligence quotients and the making of such tests is not done on a uniform basis in capital cases.

20. That in one case with which the district attorney was familiar, the IQ tests results were used as a factor in his decision as to what disposition to make of the case, along with the chronological age and psychological age, etc., of the defendant.

21. That the screening process in the district attorney's office comes after the warrant, but sometimes before the warrant and again before the indictment and disposition or trial; that the indictment itself is sort of outside the whole picture as to first degree because of the forms which the secretaries use are those forms being printed in Raleigh and all being of a first degree nature.

22. That the district attorney would consider everything and anything in reaching his decision with respect to whether or not an individual should be tried for his life in a capital case and that one of the things he would consider might be whether or not the defendant had been drinking some intoxicating beverage.

23. That each defendant that comes through the district attorney's office for a determination of whether or not he will be tried for his life is not given the same test or tests and that the same screening apparatus procedures are not applied to each defendant.

24. That the tests in any case is subjective of honesty and in each case the facts of each case as the individual facts may be brought out is mainly what is considered by the district attorney's office; that in some cases a co-defendant, indicted for a capital case may be allowed to plead to something less in exchange for his testimony against the other co-defendants.

It is submitted that based upon this record, there exists no established, uniform, evenly applied, impartial, or

fair procedure in the Twenty-Sixth Judicial District for the determination of who shall be spared a trial for his life and who will not. It is not argued nor intended to be inferred by this writer that solicitorial discretion is unconstitutionally exercised in any but capital situations. It is most strenuously urged that the unique qualities of death, or the absence of life, with all its finality must be judged and viewed in light of its severity and absolute nature. To be tested, as it were, in a vacuum exposed only to its environment of irretrievable consequences. It is unique in our system of jurisprudence and must therefore be judged accordingly. Nor is this argument intended to infer that the entire system of, and mechanics for, prosecution of alleged crimes be handled devoid of discretion in a prosecutor, save for the offenses for which death may result.

Surely FURMAN and its companion cases would circumscribe and condemn the process which goes on in the Twenty-Sixth Judicial District in capital cases. Likewise, we contend that prosecutorial discretion applied unevenly to all subjected to it goes to the very heart of the intent of FURMAN.

II. THE DEATH PENALTY AS APPLIED IN NORTH CAROLINA IS UNCONSTITUTIONAL PER SE.

There are additional reasons why the death penalty reinstated by WADDELL violates the essential guarantees of the Eighth and Fourteenth Amendments. These reasons are interrelated in the prevailing FURMAN opinion, and we treat them together here. Essentially, FURMAN reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American states (and by the federal government and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This was so because

the occasional and virtually random extinction of human life was a cruelty compounded by inequities, and because the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose. We now ask the Court to indulge an examination of death as a penalty unto itself.

We start with the elementary truth that legislative authorization of a punishment does not establish its conformity to Eighth Amendment principles or decency. TROP v. DULLES, 356 US 86, 104 (1958) (plurality opinion of Chief Justice Warren). If this were not so, the Eighth Amendment would be little more than good advice from the founding fathers to future legislators. TROP v. DULLES, supra. The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, placed them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Court. WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE, 319 US 623, 638 (1943).

This basic postulate is the source of the most delicate problem of Eighth Amendment adjudication. Striking the balance between respect for the primary power to define crimes and fix sanctions and the diligence commanded by the constitutional role of the judiciary to protect and preserve the Constitution's guarantees of individual rights against government -- that is, necessarily, majoritarian -- overreaching. The inescapable tension and its resolution were described with as much precision as the subject permits in WEEMS v. UNITED STATES, 217, supra, where it was stated:

> "...prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of

the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such cases, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account -- that is a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

Thus, although a fitting deference to legislative will and to autonomy of the States is always required, the Constitution of the United States bears the responsibility, placed exclusively upon it in the last analysis, to define and uphold the specific limitations which a written Constitution has erected as the boundaries beyond which no action or decision of American government may go.

There are circumstances under which the danger is particularly great that legislative judgment will not duly heed the constitutional rights of individuals. Here judicial scrutiny of legislation ought to be commensurately exacting. This is most

frequently the case where statutes fall harshly only upon "discreet and insular minorities" and where their operation takes a form that "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation. It is especially the case where cruel criminal punishments are applied to a very few: that is, in circumstances where the Eighth Amendment may be colorably invoked. And in the present case, additional considerations arising from the unique nature of the punishment of death require an uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a maturing society. TROP v. DULLES, supra.

First, the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. The Amendment stands to assure that respect for individual human life and dignity restricts the state's responses to even the most culpable criminal conduct. Yet the decision to use capital punishment on a man implies a judgment that his dignity and worth may be denied absolutely, and that his life ceases to be sacred when it is thought useful to kill him. Such a judgment deliberately to extinguish human life -- to employ a sanction that necessarily denies the very value upon which the Eighth Amendment rests -- imperatively calls upon the obligations of the judiciary to judge the constitutionality of punishment from an independent perspective. FURMAN v. GEORGIA, supra, 408 US at 313-314 (concurring opinion of Mr. Justice White).

Second, the death penalty bears an awesome and irrevocable finality incomparable with other punishments. The United States Supreme Court has said of sterilization that "there is no redemption for the individual whom the law touches." SKINNER v. OKLAHOMA EX REL WILLIAMSON, 316 US 535 at 541 This is literally

true of capital punishment. No eloquence can embellish, nor human mind entirely conceive, death's utter irreversibility. New knowledge, second thought, calmer passions, lessons of experience -- every known corrective for the inevitable errors of judgment in penological, political, and constitutional experimentation comes too late.

Third, any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that work which is civilized, Twentieth-Century society can accept. We do not deal here with a punishment that can be considered cruel only in relation to the conduct that it is used to regulate, cf. ROBINSON v. CALIFORNIA, 370 US 660 776 (1962) ...cruel in "consideration of the mischief and the remedy, WEEMS v. UNITED STATES, supra, 217 US at 373.

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual in the constitutional sense because it is thought justified by the social ends it was deemed to serve." FURMAN v. GEORGIA, supra, 408 US at 314 (concurring opinion of Mr. Justice White).

It is not an overstatement to describe confinement under sentence of death as exquisite psychological torture. See PEOPLE v. ANDERSON, 6 Cal 3d 628, 493 P 2d 880, 894 (1972). With the commendable motive -- and under the inescapable obligation -- of striving to avoid erroneous or illegal executions, Twentieth-Century American justice has prolonged that torture. Of 608 persons under sentence of death at the end of 1970, 302 had been on

death row for more than three years, 165 for more than five years, 81 for more than seven years, and 67 for more than eight years. UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930 - 1970, at Page 42 (August 1971). Contemporary human knowledge of the nature of suffering and its effects of suffering upon the human mind teach that over such extended periods, the familiar manifestations of immediate terror seizes the extraordinary anxiety and pain of condemnation find other outlets. Anguish can no longer be conceived as some enormous multiple of the pain of a broken bone or a crushed fingernail, because human beings cannot tolerate many such multiplications, without severe personality distortions such as the denial of reality. The effects of these coping mechanisms observed in death row prisoners are acute; the alternative is emotional breakdown. The physical and psychological pain of execution itself -- whether life is destroyed by gas, by electrocution, or by other means -- is, of course, unmeasurable. It is one of the questions to which capital punishment cuts off an answer, leaving only such scant comfort or nagging doubt as speculation may provide. "Although our information is inclusive, it appears that there is no method available that guarantees an immediate and painless death." FURMAN v. GEORGIA, supra, 408 US at 287 (concurring opinion of Mr. Justice Brennan).

Here again, the ordinary deference due to legislative judgment encounters the objection that legislators, in common with all other men, simply CANNOT know significant facts on which advised, dispassionate judgment out to turn at least in part. The decision to kill a human being is intractably a decision to do an act whose most immediate major consequences are unknowable. No amount of legislative inquiries or knowledge can close up that gap.

Fourth, the compatibility of the death penalty with Eighth Amendment values is called into question by its de jure or de facto abandonment among civilized nations. Capital punishment has been abolished by most of the countries of Western Europe and the Western Hemisphere, and is now in virtual disuse throughout the world. A penalty thus progressively repudiated on a world-wide scale surely warrants close and critical examination when tested by the constitutional standards of decency of a nation whose citizens would be widely appalled to believe it laggered in the enlightened administration of justice.

Fifth, long-standing traditions defining the judicial role in capital cases recognize the need for close scrutiny of the punishment of death. The principle of strict construction in favorem vitae runs deep in Anglo-American history, and is only one exemplification of the special safeguards that apply in legal proceedings when life is at stake. Review of procedural issues in death cases has been pursued under a policy of resolving legal "doubts in favor of the accused," and capital convictions generally have been scrutinized on appeal with an avowedly strict eye for error. At a time when the other considerations we have enumerated raise the question of the continuing constitutional validity of the death penalty itself, it is appropriate that the same strict scrutiny be turned upon that question itself.

Finally, in suggesting that sort of scrutiny, we ask no more of the court than society itself demands. In other punishments -- even punishments of extreme severity -- are and have been long accepted without extraordinary controversy, the collective soul searching, and the parade of elaborate justifications and rationalizations that have accompanied the peculiar institution of the death penalty. Despite the relatively minuscule

number of its victims, the justifiability of the death penalty has been the subject of continuing and heated debate in religious, academic, legislative, and law enforcement circles and among the general public. It is surely the case that "at the very least... contemporary society views t.is punishment with substantial doubt." FURMAN v. GEORGIA, supra, 408 US at 300 (concurring opinion of Mr. Justice Brennan).

The moral character of this debate is as significant as its prevalence. The opposition to capital punishment -- frequently voiced by religious denomination, among others -- has been vigorously asserted on the basis of "fundamental, moral, and social values in our civilization and in our society." Proponents of the death penalty have responded with equal moral fervor. Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument. Agonizings of this sort that can neither be resolved nor stilled suggest a widespread perception that there is something fundamentally questionable about the penalty of death. In view of the extreme infrequency of its use, the troubled concerns which the punishment invariably arouses can only be explained by its uniquely and profoundly problematic aspects: its dissonance with the basic values of our society. For reasons to which we shall return -- reasons having to do primarily with the rarity and secrecy of the actual use of the death penalty and with the outcast character of those subjected to it -- the problematic aspects of capital punishment have not stayed state and federal legislatures from enacting it. But those aspects particularly warrant independent and stringent examination of the death penalty by this court at a moment when this state, which has not executed a man or woman for seven and a half years, agonizes once again upon the brink of resuming executions.

Such an examination requires that the court determine whether the manifest cruelty of taking human life is or is not justified by the social ends it is deemed to serve. Because of the unique character of the death penalty, those justifications seem real and substantial and they must conform to the fashion in which the penalty is applied in fact. If "less drastic means for achieving the same basic purpose" are available, the state must use them, rather than indulge in the "pointless and needless extinction of human life with only marginal contributions to any discernable social or public purposes." This much is implied in the duty of the court to determine whether the action (of killing people) bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification, or whether, conversely, the punisyment of death is excessive and therefore unconstitutional.

III. SUMMARY.

In the final analysis, the death penalty becomes a product of the judgicial process. Legislative action, theoretically echoing the role of the majority, unless found violative of the Constitution of a particular state or of the Republic, is entitle to exercise by the executive and judicial branches. Thus, when the people, through their legislature, declare the consequences which shall result upon a given set of facts, the judicial process begins and must inevitably bear the burden of exercising the legislative mandate. Hence, guilt or innocence becomes wholly a judicial function. A finding of fact -- a judgment -- whether by judge or jury thus becomes the last and crucial test of equal justice under law -- the most notable aspiration of our society. Judges, lawyers, legislators, educators, and philosophers may debate the merits of the various schemes by which such a determina-

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tion, "the finding of fact" is made. Notwithstanding, however, "to speak the truth" (veritas dictum) is the goal. This process has evolved in Anglo-American jurisprudence. The guidelines of the process, from the Rules of Evidence to the quantity and quality of the fact-finding body may vary from time to time and from place to place but the process has been ongoing. In every instance, we implicitly praise outselves for reaching the truth. Once determined, that truth in turn forms the foundation for judicial pronouncement. Thusly, "the law", be it statutory or by historical precedent is applied to the fact. Our aspiration of equality, equal protection under the law, is thusly fulfilled..

The process, however, must not end here, for humans may err. When an error occurs, it must be and is corrected by the same process. We recognize that our beloved judicial process of fact determination as well as the subsequent application of the "law" may fall miserably short of our goal. Accordingly, in such instances, we provide the machinery for the correction of error. Not unwillingly, but rather in the sense of pride in our ability we admit of its failure. Thusly, our judgments are overturned and the process begins anew. We will not admit perfection, nor be so boastful as to contemplate likewise. The perfect judgment does not exist in our law, except as a measure of our own imperfection. The judicial process thusly becomes a convention for the regulation of our lives, our property, and our pursuit of happiness.

How then do we so ordain our judicial process? By what authority do we so boldly suggest that death or the absence of life may rest upon our fragile convention? By what exception to our legal process do we dignify our pursuit of its equal application? Could it be that by a single exception we make one, only one, exceptional -- perfect -- everlasting, irreversible and

irrevocable conclusion? If so, then we miss our goal, we abandon our pursuit and one of our number may cease to live by that same judicial process which we so vigorously defend and so earnestly dignify. We must not allow such to occur. All chance for error must not be denied in any judgment which comes from a human process. Death as a judgmental conclusion thus becomes an anomaly. The system, the judicial function, is not now nor has it every been so perfect. Each time we attempt such a conclusion its machinery is strained and contorted beyond its capacity. Man has not yet conceived a procedure so perfect, so absent of error. Whey do we continue to ask an imperfect machine to produce a perfect product? The answer must come from our frustration with the murderer, the rapist, or the firebomber. But are we to allow frustration to obfiscate fundamental pillars of our dream of equal justice under law? The answer must be no for too many possibilities for discrimination and error exist. The chances for inequality -- the denial of due process -- are inescapable. No matter how uniform our application of the rules of law we never escape the human factor. The possibility of error is never denied.

Our Constitution speaks of punishment and forbids its infliction when cruel or unusual. One begins with the assumption that death be not cruel or unusual, what then do we say of the process by which such punishment comes to be applied? Is it not cruel to admit imperfection and decree perfection? Obviously there is a flaw in our logic -- a blind spot -- to which we close our minds and indulge our frustrations. Homocide may be legally justifiable on certain occasions, but it is never legally acceptable by convention and for the sake of convenience.

Numerous rules of procedures, evidence, and construction have been produced as a by-product of the judicial process in its

futile attempts to reach the perfect judgment of death. Rules which otherwise would now come into being and which, we would suggest, tend to weaken the process itself in cases where perfection is not the elusive goal. Legal procedure - logic are at times distorted in our attempts at the impossible. Thusly it comes to me that our system is weakened, the fabric of our society is torn and our redoubling of effort produces more frustration. The conclusion must inevitable be that the derivative -- death -- is cruel because its creator is incapable of exercising such a mandate. Finally, it must be the constitutional prohibition which deserves our beloved judicial process and sustains the light along the pathway to our goal equal justice under law.

CONCLUSION

For the reasons set forth above, the Petitioner prays that because the death sentence at the time this crime was committed was unconstitutional, that this Writ of Certiorari should be granted.

APPENDIX "A"

FILED

JUN 6 1975

IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA SPRING TERM 1975

STATE OF NORTH CAROLINA

v. No. 46 - Mecklenburg

RONNIE YOUNG

Defendant appeals from judgments of Ervin, J., 29 July 1974 Schedule "C" Criminal Session, Mecklenburg Superior Court.

Defendant was tried upon separate bills of indictment, proper in form, charging him with the first degree murders of Sharon Williams and Steve Charles Holton on 18 August 1973 in Mecklenburg County.

The State's evidence tends to show that on 17 August 1973 Steve Holton and Sharon Williams were employed at the Burger Chef restaurant in Charlotte, North Carolina. At approximately 11:30 p.m., upon the close of business, they and two other employees left the building and picked up trash for a few minutes. Steve and Sharon then walked to the rear of the establishment to enter Steve's car which was parked there. Stephenie Strawser and Donna Faye Bartlett, the other two employees, went to their automobiles in front of the parking lot. Stephenie and Donna saw flashes and heard popping noises and a sound "like a cannon," coming from the area around Steve's car. Donna Bartlett saw a lot of smoke and saw three figures running from behind a dumpster situated near Steve's car. She then saw Steve Holton lying on the ground "trying to get up and brushing his hair back from his head." He was on his back near the [illegible] Sharon Williams was on the right front seat slumped over toward the steering wheel.

Dr. Bonart K. Wood, Medical Examiner for Mecklenburg County, examined the bodies at the scene about 12:45 a.m. on 18 August 1973, and pronounced them both dead. He thereafter performed autopsies and testified that Sharon Williams had a large destructive shotgun wound in the right side of the neck and, in addition, a smaller entry type [illegible] fragment of [illegible] copper jacketing from a bullet

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The large wound severed the right common carotid artery running up the side of the neck and practically severed the cervical spine and the spinal cord. Steve Kelton had a gunshot wound which entered the base of the left neck toward the shoulder. It severed the cervical spine and spinal cord. The remains of a mutilated jacket and lead core of the bullet was recovered in the upper right back. In the opinion of Dr. Wood, each victim died as a result of gunshot wounds in the neck.

Brenda Agurs and Ellen Barber Gilmore are sisters and live together in Apartment 3 at 2725 Craddock Avenue. They were together on 18 August 1973 at about 10 a.m. when defendant told them he and Richard Gordon had gone to hold up a place "but when they got there there was more people there than was supposed to be, so he had killed some people. He said that he hid behind a green trash can dumpster and when a young man walked out to empty some trash he said [he] hid on behind the trash can so he couldn't see him and said when he went to turn to walk back inside he shot the guy and said there was a girl in a car and when he shot the guy the girl screamed and he said he blasted her, too. He said that there was another guy with him but he was just shooting up in the air. He didn't hit anything. He said he had a high powered rifle. Just me and my sister were present when Ronnie Young made those statements. Her name is Ellen Gilmore."

Brenda Agurs further testified that she had known Ronnie Young about two and one-half months prior to 17 August 1973. Richard Gordon lived next door in Apartment 2 for about a year prior to August 1973 and left some guns in her apartment closet about two weeks prior to August 17. She then stated: "I saw Ronnie Young with the gun case about two or three days before the Burger Chef case and saw him the Friday night that he brought it back and put it in the closet about 12:00 or 12:30 Friday, August 17."

Ellen Barber Gilmore gave evidence corroborative of the testimony of her sister, and, in addition, testified that "We asked him why did he kill them and he said that he had been going in and out of the store and they could identify him. He said that white people had been taking from us all our lives and he would kill any of them."

Officer Dale M. Travis testified that on 21 August 1973 at 2 a.m. approximately twenty-five police officers went to 2725 Craddock Avenue and surrounded Apartments 2 and 3. The officers were admitted to Apartment 3 by a black female and a search warrant was read to her. In a closet in the front room they found a 30-30 Marlin rifle (State's Exhibit 22), a sawed-off shotgun, a .22 single barrel rifle and ammunition. Contemporaneously, the defendant was arrested in Apartment 2 by Officer Crump for the murders of Sharon Williams and Steve Melton. Fingerprints and palm prints (State's Exhibit 47) were lifted from the 30-30 Marlin rifle seized in the search. Defendant's fingerprints and palm prints were thereafter taken (State's Exhibit 49) and compared with State's Exhibit 47. Steven Randolph Jones of the SBI, an expert in the identification of fingerprints, testified that he picked out sixteen points of similarity between State's Exhibit 47 and State's Exhibit 49 and that in his opinion the inked impression of defendant's right palm shown on State's Exhibit 49 is identical with the latent palm print, State's Exhibit 47, lifted from the 30-30 Marlin rifle.

Frederick Mark Hurst, Jr. of the SBI, an expert in the field of firearms identification and comparison, testified that in his opinion State's Exhibit 13, a 30-30 Winchester fired cartridge case found approximately five feet from Steve Melton's car on the night of the murders, was fired from State's Exhibit 22. He also testified that State's Exhibit 33, a bullet fragment removed from the body of Sharon Williams, was fired from the same rifle.

After hearing testimony of Officers Dale Travis, H. R. Thompson, Larry Wayne Shank, J. D. Bumgardner and the defendant, the court made full findings of fact and concluded (1) that defendant was properly advised of his constitutional rights in accordance with Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), (2) that

"Me and Richard Gordon were up on the block at Seymour and Steel Creek where a bunch of people were shooting dice. Some of them started talking about going up to the Burger Chef and robbing it. They asked me about pulling the job. I told them 'no.' Me and Richard left and Richard asked me 'do you think we ought to do it?' I said 'no,' and he said 'O.K., forget it'. We went on down to Richard's house at 2725 Craddock Avenue and I started playing cards with Ann, who is Richard's girlfriend. I left and went home about 10:30 and left and went by a girl's house named Pat. Pat told me where the shotgun was hidden in the grass. I got the shotgun and ran and caught up with Richard and Zack. Zack had the rifle, the big rifle that I and stolen gotten (N.Y.) from Roy Ray (N.C.) Thompson. Richard had the pistol.

We walked up behind the Burger Chef. We all three stood behind the big dumpster. The light in the place went out. I saw the boy come up to the garbage dumpster and I stepped around to the other side and left Zack and Richard. I started hearing six shots. I ran back around by the other side of the dumpster and Zack was standing in front of the car. I saw Zack shoot at the man by the trunk of his car. I stepped out from behind the dumpster and shot my shotgun at the car. Richard was standing beside the dumpster when I came around. I turned and ran and Richard was right behind me. I heard approximately two more shots. Zack caught up with us on the railroad tracks. The boys up on the block told us the Manager would be parked in the back and if he did not come out with a money bag that they would have made a drop before they closed. The closest one to the car was supposed to get the money. That would have been Zack. When we got down on the track, Zack hollered and said that there was not any money. I emptied the shell from the shotgun on the railroad track by the junk yard. We went on down to Richard's house and I got some water. We gave the guns to Zack on the front porch at Richard's and he took them next door. I then went home."

Defendant testified as a witness in his own behalf. He said he and Richard Gordon were good friends and often smoked grass and dropped acid. On the night in question defendant had been drinking beer and smoking grass at Gordon's apartment. Gordon asked defendant to accompany him and Zachery McCain to the Burger Chef to get a money bag. Gordon got three guns from a closet, a rifle, a pistol and a shotgun. The three left the apartment together. Defendant had the sawed-off shotgun, McCain had the .32 pistol and Richard Gordon had the 30-30 rifle. They started walking toward the Burger Chef and on arrival stood behind a big green dumpster, each with a weapon in his hand. At that point defendant said:

"I had finally come to myself and I told Richard that I wanted out of it, that I didn't want no part of this that was going to happen. I told him that we were going to get ourselves in trouble. So we started arguing. So I threw the gun down and I told him I was going to run and he told me no, you can't run . . . He said, 'You run and I am going to kill you.' So about that time a guy came out of the place and he put the girl

an the car, I was standing beside Richard and Richard ran around the front of the car and shot him. And the door on the driver's side was open. That is when he shot the girl and ran back over there where I was.

At the time Zachary McNair was on the other side of the garbage can. I can't recall what he was doing. I heard a lot of shots. About that time he ran back around where I was and he had the shotgun in his belt and he said, 'You get up there. You done mossed up everything.' Said, 'No, I am going to make you a part of it.' That is when he took the shotgun from his belt and shot. He threw me the shotgun and said, 'Come on and let's run,' and we started running."

Defendant further testified that while they were running he ejected the shell from the shotgun on the railroad track. They continued on to Richard Gordon's apartment where defendant left the gun and went home. He stated he was arrested on Tuesday morning between 2 and 3 a.m. in Richard Gordon's apartment, that he was upstairs in bed with one Lori Ann Alexander and "my girl friend, Amy Carelock." He said the officers called him "Nigger," kicked him while his arms were handcuffed behind his back, pushed his head and face into the wall, struck him with a flashlight and billy stick and pushed him out of the house. He further stated that an officer later snatched him out of the car and threw him in the mud and again struck him in the head.

Defendant was convicted of the first degree murder of both Bruce Bolton and Sharon Williams. The death sentence was pronounced in each case, and defendant appealed to the Supreme Court assigning errors discussed in the opinion.

RUFUS L. EDMISTEN, Attorney General, GEORGE W. BOYLAN, Assistant Attorney General, for the State of North Carolina.

GEORGE C. COLLIE, Attorney for defendant appellant.

HUSKINS, Justice:

Before pleading, defendant moved to quash the bills of indictment on grounds that the death penalty as applied in this State violates the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. After verdict he moved to arrest judgment on similar grounds. Denial of both motions constitutes defendant's first assignment of error.

Under this assignment defendant argues (1) that he was denied due process because the death penalty was applied to him in an arbitrary, capricious, subjective and selective manner due to freakish exercise of prosecutorial discretion and (2) that the death penalty as applied in North Carolina is unconstitutional per se. These contentions have heretofore been considered by this Court and rejected in numerous cases. See, e.g., State v Vick, 287 N.C. 37, 213 S.E. 2d 305 (1975); State v Armstrong, 287 N.C. 60, S.E. 2d (1975); State v Lowery, 286 N.C. 690, 213 S.E. 2d 255 (1975); State v Simmons, 286 N.C. 681, 213 S.E. 2d 280 (1975); State v Stegmann, 286 N.C. 638, 213 S.E. 2d 262 (1975); State v Woods, 286 N.C. 612, 213 S.E. 2d 214 (1975); State v McLaughlin, 286 N.C. 527, 213 S.E. 2d 239 (1975); State v Avery, 286 N.C. 459, 212 S.E. 2d 142 (1975); State v Williams, 286 N.C. 422, 212 S.E. 2d 113 (1975); State v Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974); State v Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). Assignment one is overruled.

Prior to the commencement of jury selection defendant moved to sequester all prospective jurors so he could examine the veniremen one at a time in the absence of all other prospective and selected jurors. The trial judge denied the motion and then directed that the jury be selected in the following manner:

> The entire number of jurors who are available will be brought into this courtroom tomorrow morning at 9:30 and the Clerk will read over the names of the entire jury panel at that time in the presence and hearing of the defendant and his counsel.
>
> Immediately the first twelve persons whose names are called will be directed at that time to take seats in the jury box. In other words, we will call the entire panel of jurors one at a time by name with the first twelve being seated in the jury box to my left. As soon as we do that, I will direct that the State will call in the presence and hearing of all the prospective jurors a list of the names of witnesses that the State proposes to call or list of names of witnesses that the State will call. As soon as we complete that process, then I will remove from the courtroom all of the prospective jurors except the twelve who are sitting in the jury box to my left.
>
> The other prospective jurors will be taken to the District Court's customarily used, but vacant this week, and will be sequestered in that courtroom under supervision of the Sheriff's office during the process of the jury selection.

With regard to the twelve in the jury box, the State shall then conduct their Voir Dire examination of those twelve and shall make any and all challenges for cause against any of the twelve and it shall then make its peremptory challenge. If the Court shall allow a challenge for cause or if the State shall excuse a juror peremptorily, the Clerk shall call a replacement in the box before the Solicitor completes his examination or challenge of any other of the twelve.

When the State is satisfied with the twelve in the box, the Clerk shall then tender the twelve in the box to the defendant. The defendant shall then conduct his Voir Dire examination of those twelve. The defendant shall then make any challenges for cause against any of the twelve and shall then make any peremptory challenges against any of the twelve. If by reason of cause or peremptorily, a juror shall leave the box during the course of the defendant's counsel's examination of the jurors, the Clerk shall not immediately call a replacement to the box but shall wait until the defendant shall state to the Court that he is satisfied with the remainder of the twelve which remain.

After they have been tendered him by the State, if there have been no members of the twelve removed, the Clerk shall proceed to empanel the jury. If anyone for cause or peremptorily have been removed by the defendant, then after the remaining ones have been stated by the defendant to be satisfactory with him, he shall have replacements called for the vacant seats by the Clerk from the panel at large. In so the State must by virtue of G.S. 9-21(b) be allowed to first examine any and all replacement jurors in the box and make challenges both for cause and peremptorily before the defendant shall be allowed to question any replacement. At all times the State is the party to be first satisfied with any given juror before he shall be ever tendered to the defendant. Those jurors who shall have been tendered to a defendant by the State and not challenged for cause or peremptorily by the defendant, may not thereafter be challenged by the defendant. The defendant may not stand pat at the foot of the list or make any reservation of any challenge to await and see who the replacement shall be. Once the defendant has passed, he has passed for all purposes."

In accordance with this procedure, the clerk called twelve prospective jurors who took their seats in the jury box and the State proceeded with its voir dire examination. In questioning the jurors the district attorney asked the entire panel whether any of them had read anything in the paper about the case "back in the summer of 1973." Ten of the jurors indicated in the affirmative. "At this point," defendant again moved to sequester the prospective jurors and for the right to examine them regarding what they had read or heard about the case. The court overruled the motion and instructed the jurors that he would permit examination as to whether any of them, or any of the other prospective jurors, had formed or expressed an opinion about the case. The record then recites:

". . . The Court further instructed the prospective jurors not, under any circumstances, give up [sic] the benefit of your opinion concerning what you have read or heard if you have one. In other words, don't tell us anything about what your opinion might or might not be. The sole purpose of this is simply to ascertain whether you have any opinion or not. We don't want to know what that opinion is and do not express in any way any opinion about this matter if you have an opinion. Simply indicate that you have formed such an opinion and stop at that point."

The record recites at this point that defendant thereafter exercised all of his peremptory challenges before the panel of twelve jurors was selected, but it is completely silent in regard to the actual examination of the jurors, the number and identity of those excused for cause, and the identity of those excused peremptorily.

Defendant objected and excepted to the foregoing proceedings in apt time and bases his second assignment of error thereon. He argues the trial court erred in denying his motion to sequester prospective jurors and his motion to examine the jurors concerning what they had read and heard about this case.

Matters relating to the actual conduct of a criminal trial are left largely to the sound discretion of the trial judge so long as the defendant's rights are scrupulously afforded him. State v Perry, 277 N.C. 174, 176 S.E. 2d 729 (1970). Therefore, a motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process. State v Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974); 47 Am. Jur. 2d, Jury § 197 (1969); Annot., Voir Dire--Personal Examination, 73 A.L.R. 2d 1187, 1203 (1960). Compare State v Rosoboro, 276 N.C. 185, 171 S.E. 2d 886 (1970), rev'd as to death penalty, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289 (1971), with State v Perry, supra.

Here, the jury was selected in the manner previously approved by this Court in various cases, including State v Dawson, 281 N.C. 685, 190 S.E. 2d 196 (1972); State v Cutonelia, 281 N.C. 538, 189 S.E. 2d 176 (1972); State v Alligood, 275 N.C. 166, 179 S.E. 2d 410, rev'd as to death penalty, 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971); State v Perry, supra; State v McNeil, 277 N.C. 152, 176 S.E.

2d 732 (1970), cert. denied 401 U.S. 962, 28 L.Ed. 2d 245, 91 S.Ct. 967 (1971). Accordingly, there was no abuse of discretion in denying defendant's motion to sequester prospective jurors.

Defendant's second contention under this assignment is that the court's ruling on his motion to examine jurors concerning what they had read or heard about the case denied him the opportunity to ascertain whether grounds existed for challenge for cause and the opportunity to exercise his peremptory challenges intelligently.

The right to make inquiry on voir dire examination as to the fitness and competency of a prospective juror is secured by G.S. 9-15(a). In regard to this phase of the trial, the presiding judge has the duty to supervise the examination of prospective jurors and to decide all questions relating to their competency. G.S. 9-14 (1969); State v Curry, 285 N.C. 497, 206 S.E. 2d 213 (1974); State v Harris, 283 N.C. 46, 194 S.E. 2d 796, cert. denied 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143 (1973).

Regulation of the manner and the extent of the inquiry on voir dire rests largely in the trial judge's discretion. State v Bryant, 282 N.C. 93, 191 S.E. 2d 745 (1972), cert. denied 410 U.S. 987, 36 L.Ed. 2d 181, 93 S.Ct. 1518 (1973). A defendant seeking to establish on appeal that the exercise of such discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion. State v Hoss, 272 N.C. 509, 158 S.E. 2d 617 (1968); See State v Higgs, 143 Conn. 136, 120 A. 2d 152 (1956); State v Rasor, 168 S.C. 221, 167 S.E. 396 (1933); 47 Am. Jur. 2d, Jury § 212 (1969).

The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v Allred, 275 N.C. 554, 169 S.E. 2d 833 (1969). "Obviously, prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party propounding the question, may exercise intelligently his or its peremptory challenges." State v Jarratte, supra.

When the foregoing principles are applied to this case, the proposed question, taken alone, seemingly would be within legitimate bounds of inquiry. However, the record before us fails to show the jury voir dire in context and any alleged abuse of discretion or prejudice resulting from the court's denial of defendant's motion. We perceive no prejudicial error in the trial court's action.

It is elementary that an appellate court must have in the record before it a complete account of the action by the trial court of which the appellant complains. An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court. State v Williams, 274 N.C. 328, 163 S.E. 2d 358 (1968); State v Duncan, 270 N.C. 241, 154 S.E. 2d 53 (1967).

The court's outlined procedure for the selection of the jury provided that defendant could conduct the voir dire examination of the twelve jurors remaining in the box after the State had examined them to its satisfaction and after the clerk had tendered them to defendant. That is the usual sequence in jury selection. Here, however, defendant's motion was made during the State's examination and defendant sought the immediate right to examine the jurors before the State had concluded its examination. The question which defendant proposed to ask--"What it was that they had read or heard about this case?"--could not reasonably be expected to elicit information bearing on a challenge for cause since the court allowed questioning as to any ultimate opinion the jurors had formed as a result of what they had read or heard. See State v Jarrette, supra at 640-41, 203 S.E. 2d at 732. Under those circumstances, there was no necessity for the court to allow interruption of the State's examination for such questioning by defense counsel. Even so, in an abundance of caution and fairness, the court allowed defense counsel at that time to question the jurors as to whether they had formed an opinion about the case.

The State contends that the trial court allowed every prospective juror who, for whatever reason, had formed any opinion about the

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case to be challenged for cause on that ground without further inquiry concerning the nature of the opinion or how strongly it was held. The contention seems logical in light of the procedure adopted by the trial court, but the record fails to support it. Nor will the record support defendant's argument that the court unduly limited his right to examine the jurors as to their fitness and competency. In fact, the record fails to show (1) what transpired at that time during defendant's questioning of the jurors concerning their opinions, if they had one, (2) what transpired later, i.e., during defendant's questioning of the jurors on voir dire after they had been passed by the State and tendered to him, (3) whether defense counsel posed any questions to the jurors which were disallowed by the court, or (4) whether any prospective juror who had read or heard anything about the case ultimately served as one of the twelve. The record gives us nothing tangible to support a finding that defendant was prejudiced by the jury selection process. Nothing else appearing, the selection process imports regularity. "After all, there is a presumption of regularity in the trial. In order to overcome that presumption it is necessary for matters constituting material and reversible error to be made to appear in the case on appeal." State v Sanders, 280 N.C. 67, 185 S.E. 2d 137 (1971); accord, State v Hilton, 271 N.C. 456, 156 S.E. 2d 833 (1967).

We further note that in order to preserve an exception to the court's rulings on challenges to the polls the appellant must exhaust his peremptory challenges and thereafter undertake to challenge an additional juror. State v Woods, 286 N.C. 612, 213 S.E. 2d 214 (1975); State v Allred, 275 N.C. 554, 169 S.E. 2d 833 (1969). Justice Stacy (later Chief Justice) explained this rule in State v Levy, 187 N.C. 581, 122 S.E. 386 (1924), as follows:

> "It should be observed that no ruling relating to the qualification of jurors and growing out of challenges to the polls will be reviewed on appeal, unless the appellant has exhausted his peremptory challenges and then undertakes to challenge another juror. [Citation omitted.] His right is not to select but to reject jurors, and if the jury as drawn be fair and impartial, the complaining party would be entitled to no more upon a new trial, and this he has already

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had on the first trial. [Citations omitted.] Hence the ruling, even if erroneous, would be harmless."

In a criminal appeal the burden is on the appellant to show both error and prejudice. State v. Partlow, 272 N.C. 60, 157 S.E. 2d 688 (1967), State v Phillip, 261 N.C. 263, 134 S.E. 2d 386, cert. denied 377 U.S. 1003, 12 L.Ed. 2d 1052, 84 S.Ct. 1939 (1964). Here, he has shown neither. Defendant's second assignment is overruled.

Defendant's third assignment asserts error in allowing into evidence two color photographs of the victims' bodies. We find no merit in this assignment. The photographs were admissible to illustrate and explain the testimony of witnesses Kirkpatrick, Catlett, Smith, and Bartlett. They were properly authenticated, and the jury was properly instructed that they were admitted for the sole purpose of illustrating and explaining the testimony of the witnesses. They were competent for that purpose. State v Crowder, 285 N.C. 42, 203 S.E. 2d 36 (1974); State v Crews, 284 N.C. 427, 201 S.E. 2d 840 (1974); State v Boozer, 282 N.C. 412, 193 S.E. 2d 65 (1973); State v Frazier, 280 N.C. 160, 185 S.E. 2d 682, rev'd as to death penalty 401 U.S. 1001, 31 L.Ed. 2d 205, 92 S.Ct. 853 (1972), State v Foss, 279 N.C. 413, 183 S.E. 2d 671 (1971), rev'd as to death penalty 406 U.S. 939, 32 L.Ed. 2d 702, 92 S.Ct. 2075 (1972); State v Atkinson, 278 N.C. 168, 179 S.E. 2d 410, rev'd as to death penalty 403 U.S. 948, 29 L.Ed. 2d 851, 91 S.Ct. 2282 (1971); State v Atkinson, 275 N.C. 288, 167 S.E. 2d 241 (1969), rev'd as to death penalty 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971).

Defendant next assigns as error the admission, over objection, of the confession which he made to the police. He contends the confession should have been excluded because it is "very reasonable and plausible" to conclude from the evidence received on voir dire (1) that the defendant did not understand the waiver of rights which he signed, (2) that he was promised leniency, (3) that he was too scared or frightened to understand the consequences of his act, and (4) that he lacked the intelligence or mental capacity to comprehend the documents which he signed. We find no merit in this contention.

The trial judge properly excused the jury and heard evidence bearing upon the admissibility of the confession. State v Pruitt, 286 N.C. 442, 212 S.E. 2d 92 (1975); State v Bishop, 272 N.C. 283, 158 S.E. 2d 511 (1968). Based on the evidence thus received, he made extensive findings of fact and conclusions of law supporting admission of the confession. His findings were amply supported by competent evidence and are conclusive on appeal. State v Simmons, 286 N.C. 681, 213 S.E. 2d 280 (1975); State v Pruitt, supra; State v Thompson, 285 N.C. 181, 203 S.E. 2d 781, cert. denied 419 U.S. 867, 42 L.Ed. 2d 104, 95 S.Ct. 123 (1974); State v Stepney, 280 N.C. 306, 185 S.E. 2d 844 (1972). Only defendant's own testimony supports his contentions under this assignment. The trial court was not required to accept that testimony and disbelieve other competent evidence. This assignment is overruled.

Defendant finally contends the court should have allowed his motion for judgment of nonsuit made at the close of the State's evidence. He argues that the evidence aliunde the confession was insufficient to establish that the crime charged was committed by him. This constitutes defendant's fifth assignment of error.

When the State offers evidence of the corpus delicti in addition to defendant's extrajudicial confessions, defendant's motion to nonsuit is correctly denied. State v Moore, 275 N.C. 141, 166 S.E. 2d 53 (1969); State v Allen, 265 N.C. 273, 139 S.E. 2d 601 (1965). "A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti. Full, direct, and positive evidence, however, of the corpus delicti is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." State v Whittemore, 255 N.C. 583, 122 S.E. 2d 398 (1961); accord, State v Jenerett, 281 N.C. 81, 187 S.E. 2d 735 (1972).

here, the State's evidence, aliunde the confession, clearly establishes the brutal and heartless murders of the two victims as they were leaving their place of employment. The evidence further links defendant to weapons used in the killings and places him at the scene of the crime at the time it was committed. This evidence, when considered with the confession of defendant, is amply sufficient to repel the motions for judgment of nonsuit. State v Clyburn, 273 N.C. 284, 159 S.E. 2d 868 (1968); State v Bishop, 272 N.C. 283, 158 S.E. 2d 511 (1968). Assignment five is therefore overruled.

We have carefully examined the entire record and find no prejudicial error in the trial. The verdict and judgment in each case must therefore be upheld.

NO ERROR

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By [signature] DEPUTY CLERK
30 July AD 75

FILED

JUN 6 1975

IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

No. 46 - State v. Young

SHARP, CHIEF JUSTICE, dissenting as to the death sentence:

The murders for which defendant was convicted occurred on 18 August 1973, a date between 18 January 1973, the day of the decision in State v. Waddell, 282 N. C. 431, 194 S.E.2d 19, and 8 April 1974, the day on which the General Assembly rewrote G. S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated in the dissenting opinion in State v. Jarrette, 284 N. C. 625, 666 et seq., 202 S.E.2d 721, 747 et seq. (1974), I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment.

FILED

JUN 6 1975

IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

No. 46 - State v Young

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v Williams, 286 N.C. 422, 437, 212 S.E.2d 113, 122 (1975).

FILED

JUN 6 1975

IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

No. 46 - State v. Young

Justice Exum dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 439, 212 S.E. 2d 113, 121 (1975), other than those relating to the effect of Section 6 of Chapter 1201 of the 1973 Session Laws.